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IN THE

Supreme Court of the United States

OCTOBER TERM 1949

No. 400.

FIFTH AND WALNUT, INCORPORATED and ALBERT J. HOFFMAN,

Petitioners,

—against—

LOEW'S, INCORPORATED, MARCUS LOEW BOOKING AGENCY, INC., RKO RADIO PICTURES, INC., PARAMOUNT PICTURES, INC., TWENTIETH CENTURY-FOX FILM CORPORATION, WARNER BROS. PICTURES DISTRIBUTING CORPORATION, COLUMBIA PICTURES CORPORATION, UNITED ARTISTS CORPORATION, UNITED ARTISTS THEATRE CIRCUIT, INC.,

Respondents.

PETITIONERS' REPLY BRIEF IN SUPPORT OF PETITION FOR WRIT OF CERTIORARI TO UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

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POINT I

Respondents refer to the circumstance that the Department of Justice, subsequent to the opinion by the Expediting Court in *Paramount* upon the remand, submitted proposed Findings of Fact, Conclusions of Law and a Decree and respondents assert that "Among the new proposed Findings and Conclusions are replacements,

amendments and modifications of those offered by the petitioners" (Respondents' Brief, p. 17). As petitioners deem the foregoing assertion of significance with respect to the question whether the *Paramount* adjudications offered by petitioners are final, petitioners avail themselves herein of their right and opportunity to reply.

Respondents have failed to refer to any particular Finding or Conclusion among those newly submitted by the Department of Justice to sustain the claim of respondents that the Department of Justice has proposed to alter or disturb any of the Findings or Conclusions relied upon by petitioners. Petitioners submit that the failure thus to refer to any particular Finding or Conclusion is not an inadvertent or fortuitous oversight. Analysis of the Findings and Conclusions offered by the petitioners and comparison of those Findings and Conclusions with those newly proposed by the Department of Justice demonstrate that *none* of the Findings and Conclusions essential to the petitioners' offer of proof was replaced, amended, or modified in any manner or fashion by the Findings and Conclusions proposed by the Department of Justice.

The component parts of petitioners' offer upon the trial include the Findings and Conclusions pertaining to: (1) price fixing violations (Findings 62, 63, 64, 65, 69, 70, 71; Conclusions 7(a), 8(a), 8(b)); (2) runs and clearance violations (Findings 81, 84, 72, 77, 79, 82, 83; Conclusions 7(b), 8(c), 8(e)); (3) discriminatory contracts (Finding 110; Conclusion 8(d)); and (4) joint operation violations (Findings 67, 113, 116; Conclusions 9(a), 9(b)). *The Department of Justice does not propose that a single one of the Findings or Conclusions hereinabove enumerated be replaced, amended or modified in any fashion except that Conclusion 7(b) is, in the Government's proposed Conclusions, captioned 7(c).* Nor has the Department of

Justice proposed any replacement, amendment or modification of the Judgment or Decree so far as said Judgment or Decree was affirmed by the Supreme Court and relied upon by petitioners. As the Department of Justice stated in its Memorandum to the Expediting Court in support of its proposed Findings, Conclusions and Decree in *Paramount*:

> "The Judgment proposed by the Government reincorporates so much of the provisions of the Judgment entered by this Court, entered on December 31, 1946, as was affirmed by the Supreme Court" (p. 68).

It thus appears that the Department of Justice, as the petitioners, recognizes that the essential Findings and Conclusions offered by the petitioners were affirmed by this Court and having been affirmed are not subject to further replacements, amendments or modifications. Consequently, respondents' efforts to undermine the finality of the Findings and Conclusions offered by petitioners by referring to the proposed Findings and Conclusions submitted by the Department of Justice upon the remand fails utterly and leaves unimpaired the petitioners' contention that the matters offered by them are final and settled in *Paramount* and, therefore, admissible under Section 5.

POINT II

In attempting to avoid the effects of the agreements providing for the joint operation of the Brown Theatre (Exhibits 87, 87A; R. 2252a, 2258a) Respondents' Brief states at page 21 "No defendant in this case was a party to that agreement." This statement is contrary to fact.

The record demonstrates that one of the parties to these agreements was the Louisville Operating Co. Inc. All the stock of the Louisville Operating Co. Inc. was owned by Penn-Federal Enterprises, Inc. Fifty per cent of the stock of Penn-Federal Enterprises, Inc. was owned in turn by the respondent Loew's Incorporated and the remaining fifty per cent by the respondent United Artists Theatre Circuit, Inc. (R. 830a, 1560a and 1561a). The direct operation of the Loew's and United Artists Theatre in Louisville—the theatre owned by the corporate entity, Louisville Operating Co. Inc., and one of the theatres from which pictures were moved over to the Brown Theatre in conformance with the terms of Exhibits 87 and 87A—was vested in the hands of Loew's Incorporated and its agents. Indeed, Mr. Vogel, a Vice President of Loew's Incorporated, testified that he discussed Exhibit 87 with his supposed competitor, Mr. Dolle, before the execution thereof and approved of the terms of this agreement (R. 1654a-1655a).

Moreover,—as the Main Brief in support of the petition herein has demonstrated by citations to evidence at pages 6-11 thereof,—each and every one of the defendant distributors, excepting Warner Bros., knew of the existence of these agreements and became active participants in the illegal operation of the Brown Theatre by joining and participating in the scheme of operation created by the original agreements (Exhibits 87 and 87A; R. 1654a, 1655a). It is clear then that not merely one, but all, except one, of the defendants in this case were parties to the inherently illegal agreement for the operation of the Brown Theatre.

At the conclusion of their brief in opposition, respondents assert that as a result of the consummation of the operating agreements for the Brown Theatre (Exhibits 87, 87A) "competition was not lessened * * *" (Respon-

dents' Brief, p. 24). This assertion too is patently in error. The scheme for operating the Brown Theatre most certainly reduced competition among first-run theatres in Louisville. It would be naive to conclude that as a result of the existence of the operating agreement the business of the first-run theatres in Louisville was characterized by competition rather than obvious cooperation. This cooperation was manifest not only in the "general understanding" among all the distributors and the operators of three of the four first-run theatres in Louisville (R. 925a, 926a) but by the weekly exchange of information as to gross receipts by Loew's Incorporated and Fourth Avenue Amusement Company (R. 921a). To the extent that the Brown Theatre arrangement thus substituted cooperation for competition, "competition was * * * lessened" in a manner which this Court held to be inherently illegal in *Paramount*.

CONCLUSION

For all of the reasons stated herein and stated in the petition for and brief in support of writ of certiorari to the United States Court of Appeals for the Second Circuit, the petition should be granted.

Respectfully submitted,

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